Furniture Rentors of America, Inc. *and* Teamsters Union Locals 639 & 730, International Brotherhood of Teamsters, AFL–CIO *and* Alvin Jones, Jr. Cases 5–CA–20933, 5–CA–21021, and 5–CA–21038

August 25, 1995

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS STEPHENS, COHEN, AND TRUESDALE

On May 28, 1993, the National Labor Relations Board issued its Decision and Order[1] finding that the Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act. The Board adopted the judge's finding, inter alia, that the Respondent violated Section 8(a)(5) by unlawfully withdrawing recognition from the Union, but reversed his dismissal of another 8(a)(5) allegation alleging that the Respondent violated the Act by failing to bargain with the Union over its decision to subcontract bargaining unit work.[2]

The Respondent filed a petition for review with the United States Court of Appeals for the Third Circuit. The Respondent appealed the Board's findings that it had violated Section 8(a)(5) by withdrawing recognition from the Union without having reasonable grounds to doubt the Union's majority status, and by failing to notify and bargain with the Union over its decision to subcontract bargaining unit work, the delivery of its office furniture. On September 27, 1994, the court issued its decision.[3] The court enforced the Board's finding that the Respondent violated the Act by withdrawing recognition from the Union, but remanded the case to the Board for consideration of whether the Respondent was obligated to bargain with the Union over its decisions to subcontract the furniture delivery work and to lay off the unit employees.

On January 27, 1995, the Board advised the parties that it had accepted the remand and invited statements of position. Thereafter, the General Counsel and the Charging Party Union filed statements of position.

The Board has delegated its authority in this proceeding to a three-member panel.

We have considered the original decision and record in light of the court's decision and the General Counsel's and the Charging Party Union's statements of position. We accept the court's decision as the law of the case and have decided to modify the Board's original decision by finding that the Respondent did not violate the Act by failing to bargain with the Union over its decisions to subcontract its furniture delivery work and to lay off the unit employees.

The issue here is whether the Respondent's decisions to subcontract the delivery work and to lay off the unit employees were mandatory subjects of bargaining over which the Respondent was obligated to bargain with the Union.

As noted above, the judge found that the Respondent did not violate the Act by failing to bargain with the Union over its decision to subcontract its furniture delivery work. In reaching this decision, the judge applied the test set out in *Dubuque Packing Co.*, 303 NLRB 386, 391 (1991), which the Board stated it would apply in determining whether an employer's decision to relocate bargaining unit work is a mandatory subject of bargaining.[4] Under this test, as the judge stated, the Respondent's ''subcontracting decision was a mandatory subject of collective bargaining unless Respondent can prove by a preponderance of the evidence that labor costs (direct and/or indirect) were *not* a factor in the decision.'' *Furniture Rentors of America*, 311 NLRB at 756 (emphasis in original). In finding that the Respondent did not violate Section 8(a)(5) by failing to bargain with the Union over its decision to subcontract the bargaining unit work, the judge concluded that labor costs were not a factor in the Respondent's decision, but that the decision was motivated by the Respondent's dissatisfaction with the delivery crews based on ''lower than expected productivity, unacceptable damage to furniture, complaints by customers, and thievery.'' Id. In this regard, the judge found that the arrest of three of the Respondent's employees for theft from the Respondent was ''[t]he straw that broke the camel's back and motivated

[1] 311 NLRB 749. (Members Cohen and Truesdale did not participate in the original decision.)

[2] Although the judge dismissed this 8(a)(5) allegation, he found that the Respondent violated Sec. 8(a)(5) by failing to bargain with the Union over the effects of its decision to subcontract the bargaining unit work and recommended that the Board apply a ''*Transmarine*'' remedy here. *Transmarine Navigation Corp.*, 170 NLRB 389 (1968). As the judge's finding of this violation, which the Board adopted, is unaffected by our decision here, we shall include a *Transmarine* remedy in our supplemental decision.

[3] *Furniture Rentors of America v. NLRB*, 36 F.3d 1240.

[4] The Board announced the following test in *Dubuque Packing*:

> Initially, the burden is on the General Counsel to establish that the employer's decision involved a relocation of unit work unaccompanied by a basic change in the nature of the employer's operation. If the General Counsel successfully carries his burden in this regard, he will have established prima facie that the employer's relocation decision is a mandatory subject of bargaining. At this juncture, the employer may produce evidence rebutting the prima facie case by establishing that the work performed at the new location varies significantly from the work performed at the former plant, establishing that the work performed at the former plant is to be discontinued entirely and not moved to the new location, or establishing that the employer's decision involves a change in the scope and direction of the enterprise. *Alternatively, the employer may proffer a defense to show by a preponderance of the evidence: (1) that labor costs (direct and/or indirect) were not a factor in the decision or (2) that even if labor costs were a factor in the decision, the union could not have offered labor cost concessions that could have changed the employer's decison to relocate.* [Emphasis added.]

Senker [the Respondent's president] to subcontract *all* the delivery work.'' Id. (Emphasis in original.)

On review, the Board rejected the judge's application of the *Dubuque* ''labor cost concession test.'' The Board found instead that the Respondent's decision to subcontract the furniture delivery work fell within the category of ''*Fibreboard* subcontracting'' cases in which it intended to apply the analysis set out in *Torrington Industries*, 307 NLRB 809 (1992), issued after the judge's decision here.[5] The Board explained its *Torrington* ''*Fibreboard* subcontracting'' analysis in *Furniture Rentors*, 311 NLRB at 750:

> [B]ecause the Supreme Court had already determined that such [*Fibreboard*] subcontracting decisions are a mandatory subject of bargaining, we saw ''no need to reinvent the wheel by rebalancing the factors weighing for and against a finding that the decision is subject to the bargaining obligation'' . . . . Consequently, in *Torrington Industries*, although we found that labor costs were involved in the respondent's decision to lay off the employees at issue there, we specifically stated that we did not see the ''usefulness of the *Dubuque* 'labor cost concession' test'' in such ''*Fibreboard* subcontracting'' cases and did not apply it there. [Footnotes omitted.]

The Board found that *Torrington*'s ''*Fibreboard* subcontracting'' analysis was applicable here because, first, all that was involved in the Respondent's decision to subcontract the furniture delivery work was the substitution of one group of workers for another and, second, the Respondent failed to show that its reasons for laying off the unit employees and subcontracting the bargaining unit work involved ''entrepreneurial decisions that are outside the range of bargaining or decisions dictated by emergencies that render bargaining impractical.'' *Furniture Rentors*, 311 NLRB at 750. As to the latter reason, the Board found that the Respondent's reasons for subcontracting the furniture delivery work were amenable to the bargaining process because those reasons involved employee conduct (i.e., lower than expected productivity, damage to furniture, customer complaints, and thievery), ''an issue which would be of concern to the Union as well as to the Respondent and an issue over which the Union was in a strong position to take action, both through negotiation with the Respondent and the education of the unit employees as to the Respondent's concerns.'' Id. In this regard, the Board found that the Respondent's slow delivery rate, one of its proffered reasons for subcontracting the furniture delivery work, ''concern[ed] the need for improved efficiency and thus involve[d] labor costs in the broad sense of the term.'' Id. at 751. The Board further found that the Respondent's concern over damage to furniture also involved the issue of labor costs and concluded that improved efficiencies in delivery and reduction in damage ''could have effected cost savings that might have resulted in the Respondent's retention of the delivery service.'' Id. Accordingly, the Board found that the Respondent violated Section 8(a)(5) by failing to notify and bargain on request with the Union over its decisions to subcontract the furniture delivery work and to lay off seven unit employees and the effects of those decisions.

In remanding the case to the Board for reconsideration of whether the Respondent's decisions to subcontract the furniture delivery work and to lay off the unit employees were mandatory subjects of bargaining over which the Respondent was obligated to bargain with the Union, the court found, in effect, that the Respondent's decision to subcontract the furniture delivery work fell within the third category of management decisions identified in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).[6] The court explained that whether decisions within this category require mandatory collective bargaining depends on the extent to which ''the subject proposed for discussion is amenable to resolution through the bargaining process.'' *Furniture Rentors of America*, 36 F.3d at 1246, quoting *First National Maintenance*, 452 U.S. at 678. Accordingly, bargaining over management decisions in this third category ''should be required only if the benefit, for labor-management relations and the collective bargaining-process [sic], outweighs the burden placed on the conduct of the business.''[7] Id., quoting *First National Maintenance* at 679. Noting that the *Fibreboard* Court had ''implicitly'' engaged in such an analysis, the court found that the Board's holding in *Torrington* was ''at odds with the principles of

[5] As the Board explained:

> [W]e specifically approved the judge's reliance in *Torrington Industries* on *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964), to resolve the issue presented there: whether the respondent's decision *to lay off* unit employees was a mandatory subject of bargaining. We also emphasized that we would continue to apply a ''*Fibreboard* subcontracting'' analysis in cases that, like *Torrington Industries*, are ''factually similar to *Fibreboard*, in which virtually all that is changed through the subcontracting is the identity of the employees doing the work.'' [*Furniture Rentors of America*, 311 NLRB at 750 (footnote omitted; emphasis in original).]

[6] *Furniture Rentors of America*, 36 F.3d at 1246, quoting *First National Maintenance*, 452 U.S. at 677:

> In *First National*, the Court identified three types of management decisions: (1) those with ''only an indirect and attenuated impact on the employment relationship''; (2) those that ''are almost exclusively 'an aspect of the relationship' between employer and employee,'' such as ''the order of succession of layoffs and recalls . . . [and] work rules''; and (3) those ''that [have] a direct impact on employment . . . but have as [their] focus only the economic profitability of'' non-employment-related concerns.

[7] Member Cohen notes the similarity between his own views in this regard and those of the court. See *Geiger Ready-Mix Co. of Kansas City*, 315 NLRB 1021 fn. 18 (1994).

Fibreboard and *First National*.'' *Furniture Rentors of America*, 36 F.3d at 1247. In this regard, the court found that the Board erred in substituting for *First National*'s ''balancing test'' a ''virtual *per se* rule'' that examined a subcontracting decision ''only to see whether it is analogous to *Fibreboard*'s general factual framework.'' Id. at 1247 and 1248. Finding this analysis ''simplistic,'' the court explained that:

> In determining whether a subcontracting case is legally similar to *Fibreboard*, it is important to consider not just the employer's decision to contract work out, and how that decision affects its operations, *but whether, as in Fibreboard, the employer's decision was driven by labor costs or some other difficulty that can be overcome through collective bargaining.* [Id. at 1248. Emphasis added.]

Applying this analysis here, the court found, in effect, that the Respondent's decision to subcontract the furniture delivery work neither involved labor costs nor concerned ''some other difficulty that [could] be overcome through collective bargaining.'' Id. at 1248. As to the former, the court conceded that the judge's use of the phrase '''lower than expected productivity,' standing alone, [rang] of labor costs, a subject suitable for resolution through collective bargaining.'' Id. at 1249. The court went on to find, however, that the judge's decision, ''read as a whole indicate[d] that [Respondent Vice President] Senker's principal reason for [subcontracting] was his exasperation over the irresponsibility and dishonesty of some of his delivery employees, not labor costs as traditionally understood.''[8] Id. As to the latter, the court, again emphasizing that the Respondent's principal reasons for subcontracting the delivery work were its ''continuing problems with delivery workers' carelessness, misconduct, untrustworthiness and thievery,''[9] found that *Fibreboard* and *First National Maintenance* do not require ''employers to automatically bargain with employee representatives over the inviolability of their own property, without regard to the benefit likely to be obtained from that process.'' Id. at 1250. The court then observed that it perceived no ''likelihood of benefit to be derived from subjecting the problem of employee thievery to collective bargaining.'' Id.

As stated above, we have accepted the court's remand as the law of the case. Accordingly, in determining whether the Respondent' decision to subcontract the delivery work was a mandatory subject of bargaining, and mindful of the court's implicit instruction that we should exercise ''the judgment that *Fibreboard* and *First National* require of [us],''[10] we shall apply the test set out by the court in its decision, i.e., ''whether, as in *Fibreboard*, the employer's decision was driven by labor costs or some other difficulty that can be overcome through collective bargaining.'' Id. at 1248. In applying this test, we are constrained to follow the analysis set out by the court. In this regard, although the court indicated that it would ''not . . . substitute [its] judgment for that of the Board's [sic] on the possible benefits to be derived from collective bargaining in a situation like the one in this case,''[11] the court stated that:

> the Board needs to acknowledge that [the Respondent's] decision to subcontract its delivery work was primarily based on factors arguably not as amenable to collective bargaining as direct labor costs. The Board then needs to make a judgment about the likelihood and degree of benefit, if any, to be derived from collective bargaining in a situation of this kind and to weigh that benefit against the employer's considerable interest in taking prompt action.[12]

In light of this language and the court's analysis of the factors that motivated the Respondent's decision to subcontract the delivery work and lay off the unit employees, we find that the subcontracting decision was not a mandatory subject of bargaining because it was not ''driven by labor costs or some other difficulty that can be overcome through collective bargaining.'' In this regard, as the court explained, the Respondent's primary reason for subcontracting the delivery work was its dissatisfaction with the delivery crews based on ''lower than expected productivity, unacceptable damage to furniture, complaints by customers, and thievery.'' Although we found that such issues as employee conduct could be considered labor costs in the ''broad'' sense of the term and were amenable to bargaining, the court found otherwise. Thus, as explained above, the court found that employee conduct was outside the ''ordinary meaning'' of the term ''labor costs'' as defined in *Fibreboard* and *First National Maintenance*. The court further found, in effect, that the employee conduct at issue here, which the court defined as ''carelessness, misconduct, untrustworthiness and thievery,'' was not amenable to collective bargaining. In this regard, the court found that under *Fibreboard* and *First National Maintenance* employers were not required ''to automatically bargain with employee representatives over the inviolability of

[8] Rejecting the Board's characterization of employee work habits and conduct as ''labor costs in the broad sense of the term,'' the court stated that ''there [was] no reason to so expand the term beyond its ordinary meaning as used in *Fibreboard* and *First National*, which contemplates subjects such as wages, fringe benefits, overtime payments, size of workforce and production goals.'' *Furniture Rentors of America*, 36 F.3d at 1249.

[9] Id. at 1250.

[10] Id.

[11] Id. at 1250.

[12] Id.

their own property, without regard to the benefit likely to be obtained from the process'' and saw no benefit ''to be derived from subjecting the problem of employee thievery to collective bargaining.''

For these reasons, we find that the Respondent's decisions to subcontract the delivery work and to lay off the unit employees were not mandatory subjects of bargaining over which the Respondent was obligated to bargain with the Union.[13] Accordingly, we find that the Respondent did not violate Section 8(a)(5) by failing to notify and bargain with the Union over those decisions and shall delete this violation from our original order.

AMENDED REMEDY

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act, we shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes of the Act.

As a result of the Respondent's unlawful failure to bargain in a meaningful manner and at a meaningful time about the effects of its cessation of operations, the terminated employees have been denied an opportunity to bargain through their collective-bargaining representative at a time when the Respondent might still have been in need of their services, and a measure of balanced bargaining power existed. Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Union. A bargaining order alone, therefore, cannot serve as an aequate remedy for the unfair labor practices committed.

Accordingly, in order to effectuate the purposes of the Act, we shall order the Respondent to bargain with the Union concerning the effects on its employees of the closing of its operations, and shall order a limited backpay requirement designed both to make whole the employees for losses suffered as a result of the violation[14] and to recreate in some practical manner a situation in which the parties' bargaining is not entirely devoid of economic consequences for the Respondent. Thus, we shall order the Respondent to pay employees represented by the Union backpay at the rate of their normal wages when last in the Respondent's employ from 5 days after the date of the Board's Order until the occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the closing of the Respondent's operations on its employees; (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of the Board's Order, or to commence negotiations within 5 days of the Respondent's notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith; but in no event shall the sum to any of these employees represented by the Union exceed the amount he would have earned as wages from March 1, 1990, the date on which the Respondent subcontracted the furniture delivery work, to the date he secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain, whichever occurs sooner; provided, however, that in no event shall this sum be less than these employees would have earned for a 2-week period at the normal rate of their normal wages when last in the Respondent's employ.

Backpay shall be based on the earnings the terminated employees would have received during the applicable period, less interim earnings, with the sums due calculated in the manner set out in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest thereon calculated in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Furniture Rentors of America, Inc., Jessup, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that it will be futile for them to select a union as their collective-bargaining representative.

(b) Interrogating employees about their union sympathies.

(c) Creating the impression that employees will be discharged or otherwise disciplined because they might support the Union.

(d) Posting petitions and ordering employees to sign petitions indicating whether they are for or against the Union.

(e) Withdrawing recognition from and refusing to bargain with the Union at a time when either the Union has not actually lost the support of a majority of the employees in the bargaining unit or the Respondent does not have a reasonable doubt, based on objective considerations, that a majority of the employees want to continue to be represented by the Union.

(f) Subcontracting bargaining unit work and laying off unit employees without providing the Union with

[13] Because we have found that the Respondent's decision to subcontract was not amenable to bargaining, we find it unnecessary ''to weigh [the benefit of collective bargaining] against the employer's considerable interest in taking prompt action.'' If we were to consider this issue, however, we would adhere to the Board's original finding that the Respondent's ''considerable interest in taking prompt action'' did not rise to the level of emergency circumstances that might excuse its failure to bargain over the subcontracting decision. See *Furniture Rentors*, 311 NLRB at 751 fn. 10. Member Cohen, who did not participate in the original decision, agrees that it is unnecessary to reach this issue, and therefore does not do so.

[14] *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).

notice and an opportunity to bargain over the effects of those decisions.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain with the Union as the designated and recognized exclusive collective-bargaining representative of the bargaining unit employees on wages, hours, and other terms and conditions of employment, including the effects of its decisions to subcontract the delivery work and to lay off the unit employees.

(b) Pay the terminated employees represented by the Union their normal wages for the appropriate period set forth in the amended remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Jessup, Maryland, copies of the attached notice marked ''Appendix.''[15] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT tell employees that it will be futile for them to select a union as their collective-bargaining representative.

WE WILL NOT interrogate employees about their union sympathies.

WE WILL NOT create the impression that employees will be discharged or otherwise disciplined because they might support the Union.

WE WILL NOT post petitions and order employees to sign them indicating whether they are for or against the Union.

WE WILL NOT withdraw recognition from and refuse to bargain with the Teamsters Union Locals 639 & 730, International Brotherhood of Teamsters, AFL–CIO at a time when the Union has not actually lost the support of a majority of the employees in the bargaining unit or we do not have a reasonable doubt, based on objective considerations, that a majority of the employees want to continue to be represented by the Union.

WE WILL NOT subcontract bargaining unit work and lay off unit employees without providing the Union with notice and an opportunity to bargain over the effects of those decisions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, recognize and bargain with the Union as the designated and recognized exclusive collective-bargaining representative of our drivers and warehousemen, on wages, hours, and other terms and conditions of employment, including the effects of our decisions to subcontract the bargaining unit work and to lay off unit employees.

WE WILL pay backpay to the employees represented by the Union who were terminated when we subcontracted our furniture delivery work on March 1, 1990, plus interest.

FURNITURE RENTORS OF AMERICA, INC.